Statement of Thomas P. Sullivan
December 9, 1998

Members of the Judiciary Committee, I appreciate the opportunity to appear before you today to discuss the professional standards for obstruction of justice and perjury. My qualifications to discuss this subject include over 40 years of practice in federal criminal cases, chiefly in Chicago, but also in other cities. During most of that time I have acted as defense counsel for persons accused of or under investigation for criminal conduct. For four years, from 1977 to 1981, I served as United States Attorney for the Northern District of Illinois. Chairman Hyde and Mr. Schippers are known to me from the practice in Chicago, and I believe they can vouch for my qualifications.

During the past 35 years, I have taken an interest in but no part in politics. While I am a registered Democrat, I consider myself independent at the ballot box, and have often voted for Republican candidates. I have acted for the Republican Governor of Illinois, a Democrat Senator, and Mayor Harold Washington. I have prosecuted as well as defended Democrat and Republican officeholders. I appear today not as an advocate or partisan for President Clinton or the Democrat Party, but rather as a lawyer of rather long experience who may be able to assist you in your deliberations on the serious and weighty matters you now have before you.

The topic of my testimony is prosecutorial standards under which cases involving alleged perjury and obstruction of justice are evaluated by responsible federal prosecutors.

In the federal criminal justice system, indictments for obstruction of justice and perjury are relatively rare. There are several reasons. One is that charges of obstruction and perjury are not substantive crimes, but rather have to do with circumstances peripheral to underlying

criminal conduct. The facts giving rise to the obstruction or perjury arise during the course of an investigation involving other matters, and when prosecuted usually are tagged on as charges additional to the underlying criminal conduct.

Second, charges of obstruction and perjury are difficult to prove, because the legislature and the courts have erected certain safeguards for those accused of these "ripple effect" crimes, and these safeguards act as hurdles for prosecutors.

The law of perjury can be particularly arcane, involving the requirements that the government prove beyond a reasonable doubt that the defendant knew his testimony to be false at the time he or she testified, that the alleged false testimony was material, and that any ambiguity or uncertainty about what the question or answer meant must be construed in favor of the accused. Both perjury and obstruction of justice are what are known as specific intent crimes, putting a heavy burden on the prosecutor to establish the defendant's state of mind. Furthermore, because perjury and obstruction charges often arise from private dealings with few observers, the courts have required either two witnesses who testify directly to the facts establishing the crime, or if only one witness testifies to the facts constituting the alleged perjury, that there be substantial corroborating proof to establish guilt.

Responsible prosecutors do not bring these charges lightly.

There is another cautionary note: federal prosecutors do not use the criminal process in connection with civil litigation involving private parties. The reasons are obvious. If the federal prosecutors got involved in charges and counter-charges of perjury and obstruction of justice in discovery or trial of civil cases, there would be little time left for the kinds of important matters that are the major targets of the Department of Justice criminal guidelines. Further, there are

well established remedies available to civil litigants who believe perjury or obstruction has occurred. Therefore, it is rare that the federal criminal process is used with respect to allegations of perjury or obstruction in civil matters.

The ultimate issue for a prosecutor deciding whether or not to seek any indictment is whether he or she is convinced that the evidence is sufficient to obtain a conviction -- that is, whether there is proof beyond a reasonable doubt that the defendant committed the crime. This is far more than a probable cause standard, which is the test by which grand jury indictments are judged. Responsible prosecutors do not submit cases to a grand jury for indictment based on probable cause. They do not "run cases up the flagpole' to see how the jury will react. They do not use indictments for deterrence or as punishment.

Responsible prosecutors attempt to determine whether the proof is sufficient to establish guilt beyond a reasonable doubt. If the answer is yes, and there are no reasons to exercise discretion in favor of lenity, the case is submitted to the grand jury for indictment, which, where I come from -- and everywhere else I know about -- is routine and automatic. If the answer is no, that is, even if the evidence establishes probable cause but in the prosecutor's judgment will not result in a conviction, the responsible prosecutor will decline the case.

Some years ago, during the Bush Administration, I was asked by an Independent Counsel to act as a Special Assistant to bring an indictment against and try a former member of President Reagan's Cabinet. Having looked at the evidence, I declined to do so, because I concluded that when all the evidence was considered, the case for conviction was doubtful, and that there were innocent and reasonable explanations for the allegedly wrongful conduct.

Having reviewed the evidence here, I have reached the same conclusion. It is my opinion that the case set out in the Starr Report would not be prosecuted as a criminal case by a responsible federal prosecutor.

Before addressing the specific facts of several of the charges, let me say that in conversations with many current and former federal prosecutors in whose judgment I have great faith, virtually all concur that if the President were not involved -- if an ordinary citizen were the subject of the inquiry -- no serious consideration would be given to a criminal prosecution arising from alleged misconduct in discovery in the Jones civil case, having to do with an alleged coverup of a private sexual affair with another woman, or the follow-on testimony before the grand jury. The case simply would not be given serious consideration for prosecution. It wouldn't get in the door; it would be declined out of hand.

A threshold question is whether, if the President is not above the law, which he ought not to be, is he to be treated as below the law? Is he to be singled out for prosecution because of his office, in a case in which, were he a private citizen, no prosecution would result? I believe the President should be treated in the criminal justice system in the same way as any other United States citizen. If that were the case here, it is my view that the alleged obstruction of justice and perjury would not be prosecuted by a responsible United States Attorney.

Having said that, I'd like to address several of the specific charges in the Starr Report. The first has to do with perjury in the President's deposition and before the grand jury about whether or not he had a sexual affair, relationship or relations with Ms. Lewinsky. The President denied that he did, based on his understanding of the definition of the term "sexual relations" adopted by the court in the Jones case. That definition is difficult to parse, and one can argue

either side, but it is clear to me that the President's interpretation is a reasonable one, especially because the words which seem to describe directly oral sex were stricken from the definition by the judge. In a perjury prosecution, the government must prove beyond a reasonable doubt that the defendant knew when he gave the testimony that he was telling a falsehood; the lie must be knowing and deliberate. It is not perjury for a witness to evade, obfuscate or answer non-responsively. The evidence simply does not support the conclusion that the President knowingly committed perjury, and the case is so doubtful and weak that a responsible prosecutor would not present it to the grand jury.

It may be argued that the definition as given covers the President's conduct if he touched parts of Ms. Lewinsky's body, but here we encounter the firmly established rule that a perjury case cannot be based upon the testimony of a single witness unless there is strong corroboration to prove the falsity of the defendant's statement. The evidence does not meet that standard, because proof that the President and Ms. Lewinsky were alone, or engaged in oral sex, cannot in my judgment provide proof beyond a reasonable doubt that the requisite touching occurred.

Let me turn to the issue of obstruction through delivery of the gifts by Ms. Lewinsky to Ms. Currie. Some of the evidence on this subject is not recounted in the Starr Report, but a responsible prosecutor will not ignore the proof consistent with innocence, or which shows that an essential element of the case is absent. The evidence is that when talking to the President, Ms. Lewinsky brought up the subject of having Mrs. Currie hold the gifts, and the President either failed to respond, or said "I don't know" or "I'll think about it." According to Mrs. Currie, Ms. Lewinsky called Mrs. Currie and asked Mrs. Currie to come to Ms. Lewinsky's home to take the gifts, and Mrs. Currie did so. Ms. Lewinsky testified that Mrs. Currie placed the call to Ms.

Lewinsky. But the central point is that neither Mrs. Currie nor Ms. Lewinsky testified that the President suggested to Ms. Lewinsky that she hide the gifts, or that the President told Mrs. Currie to get the gifts from Ms. Lewinsky.

Under these circumstances, it is my view that a responsible prosecutor would not charge the President with obstruction, because there is no evidence sufficient to establish beyond a reasonable doubt that the President was involved. Indeed, it seems likely that Ms. Lewinsky was the sole moving force, having broached the idea to the President, but having received no response or encouragement, she called Mrs. Currie to take the gifts, without the President's knowledge or encouragement. That is not the stuff of which an obstruction case is made.

The final example I will address is the allegation that the President attempted to influence Mrs. Currie's testimony. The crux of the allegation is that after the President's deposition was taken in the Jones case, the President asked Mrs. Currie a number of leading questions, designed to obtain confirmation that Mrs. Currie was always present when the President was with Ms. Lewinsky. Mrs. Currie has testified that she did not feel pressured to agree with the President, and that she believed his statements were correct and therefore agreed with him: "He would say right and I could have said wrong."

This does not make a case for obstruction. Indeed, based on Mrs. Currie's testimony, which is critical to the case, the trial judge would be justified in dismissing the case at the close of the government's evidence, because Mrs. Currie's testimony establishes affirmatively that there was no effort made by the President to influence her testimony. It is common practice for lawyers to go over witnesses' testimony in a leading fashion, asking that they affirm the accuracy of what the lawyer understands the witness will say on the stand, and it has not been suggested

that in doing so the lawyer has obstructed justice. There should be no different rule when two participants to the same event are involved.

Time does not permit me to go through all of the allegations of misconduct in the Starr Report. Suffice it to say that, in my opinion, none of them is of the nature which a responsible federal prosecutor would present to a grand jury for indictment.

I will be pleased to respond to your questions.

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